

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference.<sup>2</sup> The relevant facts are as follows.

On August 31, 2015 appellant, then a 62-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hip injuries due to factors of his federal employment. He noted that he first became aware of his injuries on October 3, 2011 and their relationship to factors of his federal employment on April 14, 2015. Appellant did not stop work.

By decision dated December 1, 2015, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that his bilateral hip condition was caused or aggravated by the accepted factors of his federal employment.

Appellant subsequently requested reconsideration. By decisions dated May 11 and September 16, 2016, OWCP denied appellant's requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant then appealed the May 11 and September 16, 2016 nonmerit decisions to the Board. By decision dated March 17, 2017, the Board affirmed the May 11, 2016 decision, but set aside the September 16, 2016 decision, finding that appellant had submitted relevant and pertinent new evidence not previously considered by OWCP. The case was, therefore, remanded to OWCP for a merit review.<sup>3</sup>

On remand, by decision dated April 27, 2017, OWCP denied modification of its December 1, 2015 merit decision denying appellant's occupational disease claim.

Appellant subsequently requested reconsideration.

By decision dated August 29, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant again appealed to the Board. By decision dated July 19, 2018,<sup>4</sup> the Board set aside OWCP's April 27, 2017 decision and remanded the case for further development of the medical evidence. The Board found that the June 28, 2016 and June 29, 2017 medical opinions of Dr. Akhilesh Sastry, an attending Board-certified orthopedic surgeon, were sufficient to warrant further development of the medical evidence.<sup>5</sup>

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<sup>2</sup> Docket No. 18-0108 (issued July 19, 2018); Docket No. 17-0074 (issued March 17, 2017).

<sup>3</sup> Docket No. 17-0074, *id.*

<sup>4</sup> Docket No. 18-0108, *supra* note 2.

<sup>5</sup> The Board further set aside OWCP's August 29, 2017 nonmerit decision denying appellant's request for reconsideration as moot.

On remand, OWCP referred appellant to Dr. Kenneth D. Polivy, a Board-certified orthopedic surgeon, for a second opinion examination regarding whether appellant had sustained an employment-related bilateral hip condition.

In a November 8, 2018 medical report, Dr. Polivy noted that there was no evidence of bilateral hip osteoarthritis because appellant had undergone bilateral hip arthroplasties. He opined that appellant's bilateral hip osteoarthritis was not caused by the work injury, either by a direct injury, aggravation, precipitation, or acceleration. Dr. Polivy further opined that appellant's progressive degenerative osteoarthritis was secondary to his "genetic makeup." He advised that it was more probable than not that appellant's work as a rural letter carrier had not caused the onset of wear-and-tear osteoarthritis in his hips. Dr. Polivy concluded that appellant could perform full-time work with no restrictions.

On December 18, 2018 OWCP accepted appellant's claim for resolved primary osteoarthritis of the right and left hip, noting that Dr. Polivy found that appellant's bilateral hip condition was causally related to his work duties, but had resolved.

In a January 19, 2019 letter, OWCP requested that Dr. Polivy explain his use of the phrase "genetic makeup." It also requested that he review Dr. Sastry's June 28, 2016 and June 29, 2017 reports and provide an opinion as to whether appellant sustained a work-related bilateral hip condition.

Dr. Polivy responded to OWCP's January 19, 2019 letter on January 22, 2019. He explained that he used the term "genetic makeup" because the true mechanism was unknown. Dr. Polivy noted that there can be family histories for osteoarthritis. In addition, he noted that people may be predisposed for the development of joint osteoarthritis. Dr. Polivy opined that no physical activity caused, aggravated, precipitated, or accelerated appellant's osteoarthritis. He related that there were no peer-reviewed studies, which indicated runners develop osteoarthritis any more than nonrunners. Dr. Polivy indicated, therefore, that he would not expect that someone who walks a lot, or consistently walks long distances, would have any increased incidence of hip arthritis. He maintained that if walking a significant amount caused hip osteoarthritis, then one would see a significant incidence of hip arthritis in postal workers and other occupations; there were no studies that indicated that this was a recognized etiology. Dr. Polivy opined, therefore, that the duties of a rural carrier did not aggravate, precipitate, or accelerate the osteoarthritis even by one percent. Additionally, he disagreed with Dr. Sastry's opinion that appellant's work duties caused his bilateral hip osteoarthritis, noting that appellant's condition and need for hip arthroplasties could have been caused by nonwork-related activities and that there was no indication that his work activity contributed to his condition.

On February 19, 2019 OWCP determined that a conflict of opinion existed between Dr. Sastry and Dr. Polivy with regard to whether appellant sustained a bilateral hip injury that required surgery due to the accepted factors of his federal employment. It referred appellant for an impartial medical evaluation with Dr. John H. Chaglassian, a Board-certified orthopedic surgeon, selected as an impartial medical examiner (IME). OWCP provided Dr. Chaglassian with a statement of accepted facts (SOAF), the medical record, and a series of questions.

On March 18, 2019 Dr. Chaglassian reviewed the medical evidence of record and noted that appellant had been diagnosed with having bilateral hip arthritis. He further noted that appellant underwent right total hip replacement on November 28, 2016 and left total hip replacement on January 16, 2017. Dr. Chaglassian also noted that, on December 31, 2018, appellant retired from his job. He reported essentially normal findings on physical examination. Dr. Chaglassian opined that appellant's work duties as a letter carrier had not caused, precipitated, aggravated, or accelerated the development of his bilateral hip arthritis and the need for total hip replacements. He reasoned that appellant was predisposed to arthritis because of an inherited gene. Dr. Chaglassian indicated that Dr. Sastry had not shown a single article published in orthopedic journals that confirmed his opinion. He concluded that appellant's diagnosed condition had resolved because appellant underwent bilateral hip replacement. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Chaglassian advised that appellant could not perform his usual job due to his bilateral hip replacement; however, appellant was able to work one to two hours per day with restrictions.

In a September 13, 2019 notice, OWCP advised appellant that it proposed to rescind its acceptance of his claim for resolved osteoarthritis of the right and left hip based on its error. It explained that it mistakenly read that Dr. Polivy's report found that appellant's hip conditions were causally related to the factors of his federal employment. OWCP indicated that appellant's claim was prematurely accepted. It determined that the special weight of the medical opinion evidence rested with the well-rationalized impartial medical opinion of Dr. Chaglassian that appellant's bilateral hip condition was not caused by his work duties. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed rescission action.

In a letter dated September 30, 2019, appellant, through his then representative, contended that Dr. Chaglassian's opinion did not constitute the special weight of the medical evidence because it was biased.

By decision dated October 22, 2019, OWCP rescinded its acceptance of the claim for bilateral hip osteoarthritis, effective October 16, 2019.

### **LEGAL PRECEDENT**

OWCP may reopen a claim at any time on its own motion and may modify, rescind, decrease, or increase compensation previously awarded, or award compensation previously denied.<sup>6</sup> Once it accepts a claim, it has the burden of justifying termination or modification of benefits.<sup>7</sup> This burden applies even where OWCP later decides that it erroneously accepted a claim.<sup>8</sup> OWCP must provide a clear rationale for rescinding acceptance of a claim.<sup>9</sup>

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<sup>6</sup> 20 C.F.R. § 10.610; 5 U.S.C. § 8128(a).

<sup>7</sup> See *M.L.*, Docket Nos. 18-1058 and 18-1224 (issued November 21, 2019); *M.B.*, Docket No. 17-0688 (issued March 15, 2018); *Delphia Y. Jackson*, 55 ECAB 373, 376 (2004).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Section 8123 (a) of FECA provides in pertinent part that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>10</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>11</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to rescind its acceptance of the claim for resolved primary bilateral hip osteoarthritis.

OWCP determined that a conflict in medical opinion arose between Dr. Polivy and Dr. Sastry, appellant's attending physician. It referred appellant to Dr. Chaglassian for an impartial medical evaluation. Based upon his report, OWCP rescinded its acceptance of employment-related resolved bilateral hip osteoarthritis.

The Board finds, however, that the impartial medical opinion of Dr. Chaglassian is insufficient to meet OWCP's burden of proof as he provided no rationalized opinion in support of OWCP's decision to rescind its acceptance of resolved primary bilateral hip osteoarthritis.<sup>13</sup> In his March 18, 2019 report, Dr. Chaglassian found that appellant's bilateral hip osteoarthritis and resultant bilateral total hip replacements were not causally related to the accepted employment factors. He explained that appellant was predisposed to have arthritis because of an "inherited gene." In addition, Dr. Chaglassian noted that he strongly disagreed with Dr. Sastry's opinion on causal relationship and asserted that it was purely speculative with no professional basis, support, and merit. He maintained that appellant was going to develop arthritis that was progressive in nature because of his "inherited gene," not because he was a letter carrier. Dr. Chaglassian concluded that appellant's diagnosed condition had resolved because appellant underwent bilateral hip replacement. He did not provide adequate medical rationale to explain the basis for his conclusion that appellant's accepted employment duties did not cause or aggravate appellant's primary bilateral hip osteoarthritis. Dr. Chaglassian simply noted that appellant's bilateral hip condition was due to an "inherited gene" as opposed to the accepted employment factors, as related in the SOAF. He did not explain how appellant's osteoarthritic bilateral hip condition was solely due to nonoccupational factors.<sup>14</sup> The Board has held that any contribution to appellant's condition

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<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *K.S.*, Docket No. 19-0082 (issued July 29, 2019).

<sup>13</sup> See *D.C.*, Docket No. 10-2052 (issued August 16, 2011); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

<sup>14</sup> See *R.B.*, Docket No. 20-0109 (issued June 25, 2020); *F.K.*, Docket No. 19-1804 (issued April 27, 2020); *J.T.*, Docket No. 15-1923 (issued December 16, 2015).

by the accepted employment factors would render his condition compensable.<sup>15</sup> OWCP failed to advise Dr. Chaglassian that the Board has previously held that osteoarthritis is a compensable medical condition that can be caused or aggravated by employment factors.<sup>16</sup> Moreover, the Board has held that the resolution of a condition is not a basis for a rescission.<sup>17</sup>

For these reasons, Dr. Chaglassian's opinion is not entitled to special weight as an IME. The Board finds, therefore, that OWCP has not justified the rescission of its acceptance of appellant's claim for resolved primary bilateral hip osteoarthritis and, thus, has not met its burden of proof.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to rescind its acceptance of the claim for resolved primary bilateral hip osteoarthritis.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 26, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See *F.K., id.*; *J.B.*, Docket No. 17-2021 (issued August 8, 2018); *G.G.*, Docket No. 17-0504 (issued August 8, 2017); *Beth C. Chaput*, 37 ECAB 158 (1985) (it is not necessary to show a significant contribution of employment factors to a diagnosed condition to establish causal relationship).

<sup>16</sup> See *C.C.*, Docket No. 19-0442 (issued July 22, 2019).

<sup>17</sup> See *G.H.*, Docket No. 16-0876 (issued May 2, 2017); *S.Z.*, Docket No. 10-1764 (issued May 25, 2011).